IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINALL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.79 OF 1994

The State of Maharashtra ..Appellant
(Original Complainant)

vs.

Devichand Mishrimal Solanki
R/of 1535/16, Bhimpura,
Pune Cantonment, Pune. ..Respondent.
(Original Accused.)

Mr.V.A.Konde Deshmukh for the State.

Mr.Rahul S.Kate, Advocate for the Respondent.

CORAM : S.S.PARKAR
S.R.SATHE, JJ.

DATED : 29th August, 2005.

JUDGMENT (Per S.R.Sathe, J.). :

1. The State of Maharashtra has preferred this appeal against the judgment and order passed by the Court of 9th Additional Sessions Judge, Pune in Sessions Case No.211 of 1992 whereby the accused was acquitted of the offences punishable under section 302 and 498A of IPC.

2. Brief facts giving rise to this appeal are as under :

. Marriage of deceased Sushila had taken place with accused on 30.06.1990. Admittedly, it was second marriage of both of them. Immediately after the marriage deceased Sushila started residing with accused at her in laws house at Sahakar Nagar, Pune. After residing there for a period of about one or two months accused and Sushila shifted to separate premises at Sahakar Nagar and stayed there for about 7 to 8 months. Thereafter both of them stayed with Jatanbai, wife of brother of deceased Sushila. When deceased was residing there, she delivered a female child named as Sonu.

3. The incident in question has taken place on 17.1.1992. Since two months prior to the incident, accused and Sushila had started residing in the house which was taken on lease by Bhavarlal, husband of Sushila’s sister. As Bhavarlal had gone to Karnataka, with a view to help the accused, he had permitted him to stay in

his rented premises.

4. It is the case of prosecution that accused was ill-treating Sushila and used to beat her as she used to make a grievance about his late arrival at the residence. The accused was not providing sufficient money for household expenses. He even used to say that Sushila was a woman of bad omen. When she gave birth to a female child accused started saying that he would be required to spend more. It is alleged that accused used to ask the deceased to bring money from her brother and parents for purchase of a house and on that count used to ill-treat her. Deceased Sushila had informed about the said ill-treatment to her sister in law and her friend Khatunbi. Inspite of this illtreatment Sushila continued to stay with the accused with a sheer hope that after lapse of time there may be improvement in the behaviour of the accused.

5. On 17.1.1992 Charbavdi police chowki received information that one lady and her small child have been admitted in Sasoon Hospital as a

result of burn injuries. Infact deceased Sushila and her daughter Sonu were admitted in Sasoon Hospital. Sonu expired on the same night. When deceased was admitted in the hospital her dying declaration was recorded by the Special Judicial Magistrate in which she said that when she was preparing tea on the gas her saree caught fire hence she shouted and her husband i.e. accused went there and extinguished the fire. Her minor daughter Sonu, aged about 9 months was in her arms at that time and hence she also sustained burn injuries. When she was admitted in hospital her sister in law i.e. sister of the accused had accompanied her. After her admission accused also went there. In the meantime he informed Jatanbai, the wife of brother of the deceased about the incident and hence Jatanbai immediately rushed to the hospital. When Jatanbai made query with Sushila she told her that accused had a quarrel with her and he beat her and poured kerosene on her person and set her on fire. She, therefore, immediately gave phone message to Chandamal, the brother of the deceased . On receipt of the information about Sushila, he also went to Sasoon

hospital. When he made query with Sushila, she told him that on that day at about 4 p.m. accused had returned home. She was preparing tea on the gas. She told accused that they would go to bazaar for purchasing clothes for herself and her daughter. At that time there was some altercation between the two and accused gave her slap and fist blows and said that he would not spare her. On saying so, accused poured kerosene on her person and set her on fire. At that time Sonu was on her lap and she also sustained burn injuries. When Sushila tried to come out of the house, accused blocked her way, but she went out of the house and then the neighbourers extinguished the fire and took her to hospital. Sushila also told him that as she would be residing with accused at his house after recovery, he should not disclose the incident to anyone. Similarly, Khatunbi, friend of Sushila, Bhavarlal Chauhan, and Jatanbi, wife of Sushila's brother were told accordingly by Sushila when each of them had gone to Sushila and made query. During all this time Sushila was under treatment of Doctors at Sasoon Hospital. Though her daughter had expired on first day of

their admission the said fact was not informed to her as per the advise of the doctor.

6. On 23.1.1992 Sushila's health deteroited. At that time Sushila was informed that her daughter Sonu has expired. When she came to know about the sad demise of Sonu, she got annoyed and told the above mentioned persons that now she would not keep mum and would not allow the accused to escape free and would disclose the true facts. She expressed that she would like to give statement in respect of the real facts. The doctor on duty therefore informed the concerned officer and accordingly Special Judicial Magistrate Subhash Dahiwal went to Sasoon Hospital on 23.1.1992 at about 3.30p.m. After verifying that Sushila was in a position to give statement, he recorded the dying declaration of Sushila wherein she said that initially she had given false statement, but now she would be giving the true facts and said that on the day of incident she asked her husband as to why he used to come late at residence and on that count accused assaulted her and poured kerosene on her person

and set her on fire. When she shouted accused poured water on her. Then at about 5 O'Clock on 23.1.1992 PSI Kale recorded the complaint of Sushila in Sasoon Hospital. On the basis of her dying declaration and the complaint, police registered offence punishable under section 307, 498A of IPC against the accused. However, on the same day i.e. on 23.1.1992 at about 7.30 p.m. Sushila succumbed to the burn injuries. Police therefore drew inquest panchanama and sent the dead body for post mortem. The doctor opined that death was due to shock and toxemia as a result of burns. The police, therefore registered the offence punishable under section 302 of I.P.C. Police then recorded the statements of witnesses and also sent the clothes of deceased and other articles, which were attached by them under panchanama drawn on 18.1.1992 to the C.A. The C.A. opined that kerosene residue was found on the saree which was attached at the place of offence. Police then arrested the accused and after completion of investigation submitted chargesheet against the accused for the offences mentioned above in the Court of JMFC, Pune.

7. Finding that the accused is chargesheeted for the offence punishable under section 302 of IPC which is exclusively triable by the Court of Sessions, the learned JMFC committed the case to Sessions Court, Pune.

8. The 9th Addl. Sessions Judge, Pune framed charge exhibit 2 against the accused for the offences mentioned above. The charge was read over and explained to the accused. Accused pleaded not guilty and claimed to be tried. His defence was of total denial.

9. In order to bring home the guilt of the accused, the prosecution examined as many as 9 witnesses consisting of P.W.1. Chandanmal Rathod, brother of deceased exhibit 14, P.W.2 panch witness Rajendra Nazare, exhibit 17, P.W.3. Khatunbi Kacchi, friend of the deceased-exhibit 19, P.W.4. Subhash Dahiwal, the Special Judicial Magistrate- exhibit 20, P.W.5. Bhavarlal Chauhan, the husband of the elder sister of the deceased-exhibit 23, Dr. Shruti Joshi-exhibit 24,

Jatunbai, wife of brother of deceased-exhibit 28, Dr. Shirsankar-exhibit 29 and PSI Kale-exhibit 33. Prosecution also produced the dying declaration recorded by JMFC Dahiwal- exhibit 22, panchanama of place of offence-Exhibit 18, inquest panchanama. C.A.report exhibit 36. Post mortem notes exhibit 10 and 11. From the suggestions put to the prosecution witnesses and from the statement of the accused recorded under section 313 Cr.P.C. it appears that the defence of the accused is of total denial. According to him as prosecution witnesses are close relatives of the deceased and as Sushila died they deposed against him and that he is falsely involved in the case. The accused examined Special Judicial Magistrate Kamlakar Adhav in his defence at Exhibit 42.

10. After considering the evidence on record the learned trial Judge came to the conclusion that first dying declaration given by deceased Sushila wherein she had said that she sustained burn injuries due to accident is true and reliable and the same has to be accepted. He also held that the second dying declaration has been

recorded six days after the incident of burning and during the period of the said six days all the near relatives including the prosecution witnesses Chandanmal Rathod, Khatunbai Kacchi, Bhavarlal Chauhan and Jatanbai were near her and possibility of these witnesses tutoring deceased Sushila can not be ruled out. According to him, the second dying declaration as well as her statement exhibit 26 are not voluntary and the same can not be relied upon. He also held that there was no sufficient evidence regarding the alleged cruelty. He, therefore, acquitted the accused of the offences punishable under section 498A and 302 of I.P.C.

11. Being aggrieved by the above mentioned order, the State of Maharashtra has preferred the present criminal appeal. In this appeal before us, Shri Konde Deshmukh, learned APP has urged three points. Firstly, he submitted that the learned trial Judge has not properly appreciated the evidence on record and has given undue importance to the minor discrepancies in the evidence of witnesses Chandanmal Rathod, Khatunbi

Kacchi, Bhavarlal Chauhan and Jatunbi Rathod. Secondly, he argued before us that deceased Sushila had infact given reason for not telling true incident in the initial dying declaration and the same ought to have been believed by the learned trial Judge. Lastly, he submitted that the learned trial Judge failed to consider the fact that when there were no allegations against the accused and nobody had said that Sushila sustained burn injuries due to pouring of kerosene and setting her on fire, police have drawn the panchanama of place of offence and at that time one saree having kerosene smell was found at the said place and the said evidence was sufficient to show that the earlier statement given by Sushila that she sustained burn injuries while she was preparing tea on the gas is not true. The second dying declaration dated 23.1.1992 is recorded by the Special Judicial Magistrate by following due procedure and when Sushila was in a condition to make statement. However, the learned trial Judge wrongly disbelieved the same.He, therefore submitted that relying on evidence of second dying declaration recorded on 23.1.2005 as well as oral

dying declarations made to Chandanmal Rathod-exhibit 14, Khatunbi Kacchi-exhibit 17, Bhavarlal Chavan exhibit 23 and Jatunbi Rathod exhibit 28, accused be convicted for the offences punishable under section 498A and 302 of I.P.C. As against this, Shri R.S.Kate, learned Advocate for the accused supported the Judgment and order passed by the learned trial Judge and submitted that the learned trial Judge has rightly appreciated the evidence on record and correctly held that the conduct of prosecution witnesses not complaining to police about the alleged incident, though Sushila had told them about the same clearly goes to show that their testimony is not reliable.He, therefore, submitted that the learned trial Judge rightly held that prosecution has failed to prove beyond reasonable doubt that accused ill-treated deceased Sushila and committed her murder. He also submitted that the view taken by the learned trial Judge can not be said to be erroneous. On the contrary, same is possible and as such High Court can not interfere with the said view and the decision of the trial Judge. In order to substantiate this proposition he has

placed reliance on several decisions of the Apex Court, which will be referred in further discussion as and when necessary. The learned Advocate for defence therefore submitted that the appeal be dismissed.

12. It is not in dispute that on 17.1.1992 at about 4.00 p.m. when Sushila was at home she sustained burn injuries. Her husband poured water on her and extinguished fire and she was taken to the hospital by her neighbourers. Dr. Shruti Joshi who was then on duty examined her and noticed that Sushila had sustained 90% burns.. Admittedly, Sushila was under treatment in the said hospital till 23.01.1992 and ultimately on that day in the evening she succumbed to the burn injuries. From the perusal of the post mortem notes Exhibit 10 it is clear that the doctor has opined that the death of Sushila was due to shock and toxemia as a result of the burns.

13. The important question which falls for consideration is whether the death of Sushila was accidental, suicidal or homicidal. The answer to

this question can be given only after scanning the entire evidence on record.

14. At the outset, it must be mentioned that there is no eye witness to the incident and the case rests on the dying declarations of deceased Sushila. In all there are eight dying declarations of deceased Sushila. Five in the nature of statements made before various witnesses, two recorded by Special Judicial Magistrate and one recorded by Police Sub Inspector, which is the last one. The first oral dying declaration was made by Sushila to Dr. Shruti Joshi when she was admitted in the hospital. Prosecution has examined Dr. Shruti Joshi at Exhibit 24. From her evidence it is very clear that right from the time Sushila was admitted in the hospital, her general condition was poor but she was conscious, well oriented and was in a position to give the statement. When she asked Sushila about the history, she told her that she was preparing tea on the gas and accidently her sari caught fire. Her daughter aged about 9 months was in her arms at that time and as a

result of the same she also sustained accidental burns. It is pertinent to note that even in the case papers exhibit 27 at page 5 it is specifically mentioned that "history narrated by the patient herself". So, this is first earliest statement made by the deceased to Doctor regarding the cause of burns sustained by her. Not only that, after about 45 minutes thereafter Sushila's statement was also recorded by Special Judicial Magistrate Adhav. The said statement is at Exhibit 25. It bears the endorsement of Dr. Shruti Joshi wherein she has clearly stated that at the time of recording dying declaration Sushila was conscious and in a position to give statement. In fact she has also stated that all along the time when her statement was being recorded, she was present there. If we see the said dying declaration Exhibit 25 then it is mentioned therein :

> 1. Have you full conscious?
> Ans. Yes.
>
> 2. I have told you that I am Special Executive Magistrate. Do you understand this?
> Yes.

> 3. How you sustained burns?
> Ans. Today at 4'O Clock I am preparing tea on gas at that time my saree caught fire and I sustained burn injuries. My baby is near me and so she also burn. When I am shouted my husband came and extinguished fire. I do not have any complaint. My above statement was read over to me and I admit it to be true and correct.

If we peruse the testimony of Special Judicial Magistrate Adhav, who is examined at Exhibit 42 as a defence witness, then it is very clear that he has recorded the dying declaration after following due procedure and there is absolutely no infirmity in the same as a result of which one can raise any doubt about the genuineness and correctness. The prosecution has also not at all challenged his evidence. Thus, from the above mentioned two dying declarations, one oral and the other written, it is clear that Sushila sustained burns as a result of the accident. The testimony of above mentioned two independent witnesses is clear and cogent. In fact the prosecution has also not raised any doubt about their testimony. When such is the position, the question arises how the prosecution is alleging that death of Sushila was homicidal and it was caused at the hands of the

accused.

15. It is the prosecution case that during the period from 17th January 1992 to 23rd January 1992 when Sushila was in hospital, her near relatives namely Chandmal Rathod, P.W.1.- Exhibit 14, Bhavarlal Chauhan P.W.5- Exhibit 23, Smt. Jatanbai Rathod, P.W.7-Exhibit 28 and Khatun Kacchi, P.W.3-Exhibit 19, met Sushila and when they enquired with her she told to each of them separately that on the day of the incident in the afternoon at about 4 p.m. when she was preparing tea she asked her husband to accompany her for going to bazaar. However he refused and on that count there was some altercation between them and accused beat her, gave a kick and poured kerosene on her body and set her on fire. When she shouted and tried to go out of the house, accused blocked her way, poured water on her person and extinguished the fire. When she went out, the neighbourers who had gathered there took her to the hospital.

16. So, it is necessary to scan the evidence

of above mentioned witnesses. Coming to the evidence of P.W.7 Jatanbai Exhibit 28, who reached to the hospital immediately after the time Sushila was admitted in hospital has stated that on that day when accused came to her residence and informed about Sushila's injuries at about 5.00 p.m. she went to the hospital and made querry with Sushila and at that time Sushila told her that there was some quarrel between the accused and Sushila and then accused poured kerosene on her person and she was set on fire. She has further stated that immediately thereafter she gave phone message to Chandanmal Rathod. If really Sushila had told Jatanbai the cause of burns, then certainly she would have informed the same to Chandanmal Rathod when she gave message about Sushila's burn injuries to him. But Chandanmal Rathod does not say anything about the same, on the contrary, he pretends that nobody told him anything about the cause of burns accept Sushila. So, the evidence of Jatanbai Rathod is not trustworthy and does not inspire confidence. She has admitted in cross examination that she was near Sushila at that time for only two minutes.

It is difficult to believe that in such condition Sushila would tell her the above story.

17. P.W.1 Chandanmal Rathod, Exhibit 14, has stated that on 17.1.1992 at about 4 p.m. when he was at Bombay, he received phone message from her sister in law Jatanbai (P.W.7) that Sushila has sustained burns and is admitted in hospital. He, therefore, immediately rushed to Sasoon Hospital, Pune. At night Sushila did not talk anything with him. However, on the next day morning, when he went to the hosptial, sister of accused was sitting by the side of Sushila and when the sister of accused went out, Sushila told him that when she was preparing tea, she asked accused for accompanying her to bazaar for purchasing clothes for herself and their daughter and on that count there was some altercation between them and then accused slapped her, gave kicks and blows and poured kerosene on her person and set her on fire. At that time, her minor daughter Sonu was on her lap and she also sustained injuries. When she tried to go out of the house accused blocked the way, but when she went out, the neighbourers

gathered there hearing her shouts and they took her to hospital. The said witness has also stated that at that time Sushila told him not to tell the said fact to anybody because ultimately after recovery she was to reside with accused. Firstly, it must be noted that if we take into consideration this statement and the statement of other witnesses and in particular the dying declaration given by Sushila subsequently on 23.1.1992, exhibit 22, we find that there is some discrepancy. In the written dying declaration the cause for quarrel given by Sushila is late coming of the accused at residence, while in the oral dying declaration made before Chandmal Rathod she has given some different cause. In written dying declaration she has stated that when she shouted, her husband extinguished fire by pouring water on her person, but in Chandanmal Rathod’s evidence he has not stated accordingly. Probably, it may be deliberately, so that the accused may not get any benefit. The said witness has admitted that till 23.1.1992 he did not tell the important fact which was told to him by Sushila to anybody or even to police. The question arises whether this conduct

of the witness can be said to be natural and normal. We cannot ignore the fact that if really Sushila would have told Chandanmal Rathod about the overt act committed by the accused then certainly he would not have kept mum particularly when we find that even according to him the accused was harassing Sushila previously and on that count he had given understanding to accused. He was also knowing that Sushila had filed complaint against her first husband on the ground of cruelty. So, under such circumstances, it is very difficult to believe that Sushila had told Chandanmal that accused poured kerosene on her and set her on fire and if she had really told him accordingly, then certainly the further conduct of this witness, namely not informing this incident to anyone and not making complaint to police is most unnatural and abnormal and as such it is difficult to accept his version.

18. The next witness on which prosecution is relying is P.W.5 Bhawarlal Bhagatmal Chauhan. He is husband of elder sister of Sushila. He is a person doing money lending business. He has

stated that when he received phone message on 17th that Sushila sustained burn injuries and was admitted in hospital, on 19th he went to the hospital and when he made query with Sushila she told him that on the day of the incident quarrel took place between her and accused and on that count accused poured kerosene on her person and she was set on fire. Admittedly, this witness also does not say that he told this fact to anybody or had discussion on this point amongst the relatives. Incidently, it must be noted that this witness has also stated that previously when Sushila, her husband, this witness and his wife had gone for a tour there was some quarrel between Sushila and the accused and at that time accused had given slap to Sushila and assaulted her. So he had in fact decided to lodge a complaint, but Sushila prevented him. So, having this background, the said witness would not have kept mum having realised that the accused had gone to the length of pouring Kerosene on Sushila and setting her on fire. But even then we find that this witness has also kept mum for all those three four days. This conduct of the witness is also

highly unnatural and improbable and as such it creates grave doubt about his version.

18. P.W.3 Khatoon Kacchi, has stated that she was knowing Sushila for about 12 years and Sushila even used to tell her about her family problems. She has also stated that at one point of time she had even told Sushila to take divorce, but Sushila had refused. While considering this aspect it must be borne in mind that Sushila was not a woman who would normally keep quite and undergo sufferings with sheer hope that one day there would be improvement in the behaviour of her husband. It is pertinent to note that present accused is the second husband of Sushila. She had filed criminal case against her first husband about ill-treatment and ultimately divorce by mutual consent had taken place. The said witness has also stated that though Sushila told her about burns caused to her by the accused she also told not to disclose this fact to anyone as she wanted to reside with the accused after recovery. Firstly, this is very unnatural, if really Sushila

had sustained burns as a result of accused pouring kerosene on her person and in that her minor daughter was also burnt, Sushila would not have kept mum for five days and after telling it to others ask them not to disclose. Morever, if really she had told the true facts to the above mentioned prosecution witnesses, then they would not have kept mum for all those five days when Sushila was alive. But we find that all the above mentioned five witnesses did nothing during those five days. On the contrary they were all along talking with the accused and his near relatives as if accused had not done any wrong.

19. The prosecution witness Chandanmal Rathod-Exhibit 14 has stated that till 23.1.1992 he had not come to know that the first dying declaration of Sushila has been recorded by the Special Judicial Magistrate on 17.1.1992. In fact, the relatives of Sushila have made an attempt to pretend ignorance about the first dying declaration. It is very difficult to believe that they had no knowledge about the earlier dying declaration, particularly when Jatunbai had

reached to the hospital soon after the incident and thereafter all other relatives had also gathered. By no stretch of imagination one can say that they had no cause for discussion about the injury and the manner in which the said incident took place. All these witnesses have also stated that though Sushila's daughter succumbed to the burn injuries on 18.1.1992 in the morning, as per the doctor's advise they had not told Sushila about her death and it is only on 23.1.1992 when Sushila"s condition became precarious, they disclosed to her about the death of Sonu and at that time Sushila said that she would not keep mum and tell the true facts and would give the statement and as such the hospital authorities were informed and ultimately the Special Judicial Magistrate Subhash Dahival went to the hospital and recorded the dying declaration Exhibit 22. The said dying declaration is as follows

> "Q.1. Whether you are fully conscious and in the condition to give the statement?
>
> Ans. Yes, I am conscious, I want to give statement.

Q.2. I am a Special Judicial Magistrate and come here to record the dying declaration. Do you understand this?

Ans. Yes, I understood.

Q.3. Have you sustained burns?

Ans. Few days before the statement given by me was false. Today I am giving this statement for telling true. My husband is always coming late to house. When I wask him about that, he beat me and poured kerosene on my person and set me on fire. When I caught fire I shouted and at that time he poured water on me. I have complaint against the husband.

My above statement was read over to me and I admit it to be true and correct."

20. If we read the evidence of Dr. Shruti Joshi as well as of the Special Judicial Magistrate Subhash Dahiwal Exhibit 20, it has to be said that there are no infirmities in this dying declaration, so far as the procedural aspect is concerned. The only important thing is, in the earlier dying declaration, Exhibit 25, there is signature of Sushila while in Exhibit 22 there is no such signature, but her thumb impression is taken. The doctor was unable to give any specific reason about this. What is more to be noted is that in very short time from recording of the second dying declaration PSI Ramakant Kale Exhibit

33 has recorded the statement of Sushila. The same is running into two and half pages. The second dying declaration is very short about four to five lines while this statement recorded by the Police Officer is very lengthy and giving minute details with dates. The bear reading of this dying declaration would indicate that considering Sushila's mental and physical condition at that time, there was no possibility on her part to give such minutest details. We are not at all inclined to place any reliance on the said dying declaration, not because the same is recorded by the police officer but because of the language used in the said dying declaration and the other contents of the same.

21. It is pertinent to note that though neighbourers had gathered immediately at the spot and taken Sushila to hospital no neighbour is examined by the prosecution.

22. An attempt has been made on behalf of the prosecution witnesses to show that as Sushila had told them not to disclose true facts, they did not

take any action. However, at the cost of repetition it is to be mentioned that this version of the prosecution witnesses is not at all reliable and trustworthy.

23. Another striking factor is that in the second dying declaration it is not stated by Sushila as to why earlier she gave false declaration. It is also absent even in Exhibit 26 the statement recorded by police. So, it does appear that the relatives of Sushila have made improvement.

24. Admittedly, Sushila's daughter Sonu died on 18.1.1992, so atleast after her death and knowing the cause of death the relatives of Sushila who were otherwise so much conscious and sensitive would have made complaint against the accused but that has also not happened. So, this inaction on the part of close relatives of Sushila speaks volumes and creates grave doubt about their version. It is pertinent to note that if really the accused would have caused death of Sonu, then the near relatives of Sushila would not have

allowed the accused even to take the dead body and to do the last rituals.

25. Incidently, it must also be noted that in the second dying declaration there is no mention that Sushila decided to tell the true facts because she came to know about the death of Sonu. However, prosecution witnesses, who are the relatives of Sushila have all along made an attempt to show that when Sushila came to know about the death of Sonu, she decided to speak out the true facts. This is nothing but an attempt made by the prosecution witnesses to justify the recording of the second dying declaration and delay caused in the same. If really that would have been the reason then certainly we would have found mention of the same in the second dying declaration Exhibit 22, but that has not happened. Then it must also be noted that in both the dying declarations she has stated that when she shouted, accused poured water on her. Same is not told by any of the prosecution witneses. That obviously shows the animus of the witnesses against the accused.

26. It has also come on record that accused had sustained some minor injuries to his hands. The evidence of prosecution witness Dr.Prakash Shirsankar, Exhibit '29' shows that when he examined the accused, he found certain burn injuries on the hands of the accused and Doctor has stated that the said injuries are possible while extinguishing fire. Ofcourse at the same time he has also tried to suggest that it is difficult to have such type of injuries. But once he says that these injuries are possible then obviously benefit of the same has to be given to the accused. Much is made about the fact that the accused was not present at the time of funeral of Sushila. However, we cannot ignore the fact that by that time there was alleged second dying declaration and as a result of the same, the entire atmosphere was created against the accused so it was natural on his part not to participate. However, it has come on record that his other relatives were present at the funeral.

27. From the above discussion, we find that

the first set of dying declaration which is made at the earliest occasion clearly exonerates the accused and shows that the death of Sushila was accidental. It is true that in the panchanama of the place of offence which is drawn on January 18, 1992 it is mentioned that half burnt clothes of Sushila were found in the bucket in the house of the accused and when the same were sent to C.A., kerosene residue were found in the same. One plastic empty kerosene tin was also found on plank. Relying on this evidence, the learned A.P.P. strenuously argued before us that this circumstance lends support to the evidence of the relatives of Sushila and her second dying declaration, particularly when it has come on record that on 17th January, 1992 when police went to the house of the accused , they found that the house of accused was locked and as such they put their another lock on the said house and sealed it. Thus it is suggested that there was no question of any planting etc. Further in the panchanama of the place of offence, it is also mentioned that at the relevant time, the room appeared to be washed and cleaned. If really it

would have been so then it is difficult to believe that the clothes of deceased Sushila would remain there and accused would not care to throw it. We also can not ignore the fact that prosecution has not at all adduced any specific evidence to show as to when the clothes of Sushila were removed, by whom and where. So under such circumstances, it is not at all safe to merely rely on the said panchamana and consequently the said circumstance and read the same in favour of the prosecution when particularly entire other evidence of the prosecution does not inspire confidence.

27. Much is made about the fact that the accused did not take Sushila to the hospital. According to prosecution this conduct of the accused shows his guilty mind. It is correct that normally he should have taken Sushila to hospital but it has come on record that the sister of the accused was immediately called and she immediately took Sushila to the hospital while the accused went to the house of Jatanbai who was also residing very near from the house of the accused to inform her about the incident. If really the

accused had committed the overt act of pouring kerosene and setting her on fire then he would not have immediately rushed to Jatanbai, the near relative of Sushila to inform them about her burnt injuries. So, merely because he did not accompany Sushila to the hospital one cannot come to the conclusion that he had guilty mind. On the contrary, soon after the time she was admitted, the accused had reached there. So, prosecution can't make capital of the fact that the accused did not take Sushila to the hospital.

28. In view of the above discussion, we feel that first set of dying declaration namely the deceased disclosing the cause of injury to the Doctor and then giving statement before the Special Judicial Magistrate is more reliable. It is not even the case of the prosecution that Sushila gave such earlier statement because of any tutoring of her husband or because of any influence or undue pressure of the husband. On the contrary both these statements have been made by Sushila when the accused was not even present and there was absolutely no time for him to give

any threats to Sushila and tell her that she should not disclose his name. As against this, we find that right from 17th January, 1992 to 23rd January, 1992, close relatives of Sushila namely Chandmal Rathod, Jatanbai, Bhavarlal Chauhan and Khatim Kacchi were with her. According to them, there was some previous history showing ill-treatment to Sushila at the hands of the accused. So, under such circumstances there was every possibility of they tutoring Sushila. One may feel that if really the accused would not have done anything to Sushila, why she should state against him merely because she was forced or tutored by her close relatives. However, while considering this aspect we also cannot ignore the fact that there were some minor disputes between Sushila and the accused, so as a result of the same Sushila might have deposed against the accused at the instance of her close relatives. That possibility certainly cannot be ruled out. While considering this aspect, useful reference shall have to be made to the case relied by the defence. In **Kamala V/s. State of Punjab [1993 Cr.L.J. 68],** Their Lordships of the Supreme Court

observed :

> "If there are more than one dying declaration, then they should be consistent particularly in material particulars and if there are glaring inconsistencies in it then it cannot be used for the conviction of the accused."

29. **In S. Ismail V/s. State of Maharashtra [1993(1) Mah.L.J. 131],** in similar circumstances, earlier the woman had disclosed that the burn injuries were received due to accident while in her subsequent declaration she involved her husband in causing her death and Their Lordships held that,

> "considering the first dying declaration of the deceased herself exonerating the accused of any liability, the accused cannot be held guilty of causing murder of his wife".

30. In the instant case, if we take into consideration the entire evidence of the prosecution witnesses, Chandanmal Rathod Exhibit ‘14’, Khatim Kachhi Exhibit ‘19’, Bhavarlal Chauhan Exhibit ‘23’ and Jatanbai Rathod Exhibit ‘28’, it is clear that the same is not consistent and their testimony does not inspire confidence.

On the contrary from the circumstances on record, it is very clear that there was every possibility of these witnesses tutoring Sushila and as a result of the same, the second dying declaration might have been recorded. In **State of Assam V/s. Maulluddin [AIR 1983 SC 274],** when there was such possibility Their Lordships of the Apex Court have observed that :

> "It is not outside the realm of possibility that her statement might have been inspired by her relatives and, therefore, it will not be safe to base the conviction on such a dying declaration".

31. In view of the above, we are of the view that the prosecution has failed to prove beyond reasonable doubt that the second dying declaration of Sushila is truthful and genuine and it is not the outcome of any tutoring. The Lower Court has rightly considered entire the evidence and has taken the view that the first set of dying declaration of Sushila is voluntary, made without any tutoring or prompting from any side and recorded after following due procedure and formalities and as such has to be accepted while the second set of dying declaration appears to be

the outcome of tutoring and prompting of near relatives of Sushila. This view cannot be said to be perverse or even erroneous. Shri R.S. Kate, learned advocate for the accused has submitted that when such is the position, the High Court has to dismiss the appeal against the acquittal. For this proposition, he has placed reliance on a case, **Khedu Mohton and othere V/s. State of Bihar [AIR 1971 SC 66]** wherein the Apex Court has observed :

> "Though the powers of the High Court in considering the evidence on record in appeals under Sec. 417 are as extensive as its powers in appeals against convictions the Court should bear in mind the presumption of innocence of accused. Where the lower court has found the accused not guilty unless the conclusions reached by it are palpably wrong or based on erroneous view of the law or that its decision is likely to result in grave injustice, the High Court should be reluctant to interfere with its conclusion. if two reasonable conclusions can be reached on the basis of the evidence on record then the view in support of the acquittal of the accused should be preferred. The fact that the High Court is inclined to take a different view of the evidence on record is not sufficient to interfere with the order of acquittal".

32. In the case of **Harijan Megha Jesha V/s. State of Gujarat [AIR 1979 SC 1566],** it has been

observed :

> "Appeal against acquittal - Appreciation of evidence - View taken by lower court not perverse but borne out by evidence on record and reasonably possible - High Court ought not reverse order of acquittal by taking different view of evidence".

33. The view expressed in the above cited ruling is reiterated by the Apex Court in the case of **Tota Singh and others V/s. State of Punjab [AIR 1987 SC 1083],** wherein it is observed :

> "The mere fact that the Appellate Court is inclined on a reappreciation of the evidence to reach a conclusion which is at variance with the one recorded in the order of acquittal passed by the Court below will not constitute a valid and sufficient ground for setting aside the acquittal. The jurisdiction of the Appellate court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made y the lower Court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the Court below is such which could not have been possibly arrived at by any Court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the court below has taken a view which is a plausible one, the Appellate Court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the Court below on

its consideration of the evidence is erroneous".

34. In view of the above position there is no scope for interference with the finding recorded in this case by the trial Court as the same is based on proper appreciation of evidence and can not be said to be erroneous or unreasonable.

35. Though the accused is charged for murder of his daughter Sonu also, the prosecution has not adduced any evidence worth the name to show that accused intentionally poured kerosene on the person of Sonu or for that matter he poured Kerosene on the person of Sushila knowing fuly well that Sonu was in her arms or on her lap and then set them on fire. On the contrary as mentioned in the earliest dying declaration of Sushila when accidently her saree caught fire, Sonu was in her arms and as such she also sustained burn injuries and ultimately succumbed to the said injuries. So, the prosecution has failed to prove beyond reasonable doubt that the accused committed murder of Sonu.

36. The accused is also charged for the offence punishable under Section 498A of I.P.C. The close relatives of Sushila namely Chandmal Rathod, Khatunbi Kacchi, Bhavarlal Rathod and Jatanbai have stated that accused used to harras and ill-treat Sushila, Bhavarlal has stated about the incident which had taken place when all of them had gone for a trip. They have also stated that accused was insisting Sushila that she should bring money from her brother or parents for purchase of house, but it is to be mentioned that admittedly none of them had taken any action against the accused when Sushila made such a complaint. They had never called any panchas to settle the dispute. Above all, it must be mentioned that neither in the first written dying declaration nor even in the second written Dying Declaration Sushila has made any reference about the alleged ill-treatment given to her by the accused. So, under such circumstances when there is no corroboration to the testimony of interested witnesses, it is difficult to hold that the prosecution has proved beyond reasonable doubt that Sushila was subjected to cruelty as

contemplated under Section 498A of I.P.C. at the hands of the accused. The learned trial Judge has rightly considered the entire evidence in this behalf and as held that the prosecution has failed to prove the charge under Section 498A of I.P.C. There is no reason to interfere with the said finding.

37. We have already mentioned above that after appreciating the evidence independently, we feel that the first set of dying declaration is more reliable and is free from any prompting and tutoring, while, the second set of dying declaration appears to be the outcome of tutoring and prompting. So, we are in fact of the view that the approach of the Trial Court in appreciating the evidence is correct and certainly it is a possible view. So, having regard to all the facts and circumstances of the case and considering the position of law, we have no hesitation to hold that the finding of acquittal recorded by the Trial Court needs no interference. Hence, the appeal is dismissed..

. Bail Bond of the accused stands cancelled.

(S.S.Parkar, J.)

(S.R.Sathe, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINALL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.79 OF 1994

The State of Maharashtra ..Appellant
(Original Complainant)

vs.

Devichand Mishrimal Solanki
R/of 1535/16, Bhimpura,
Pune Cantonment, Pune. ..Respondent.
(Original Accused.)

Mr. for the Appellant.

Mr.Rahul S.Kate, Advocate for the Respondent.

CORAM : S.S.PARKAR
S.R.SATHE, JJ.

DATED : 29th August, 2005.

Final Order (Per S.R.Sathe, J.). :

. For the reasons recorded seperately, the Court passes the following order :

. Having regard to all the facts and circumstances of the case and considering the position of law, we have no hesitation to hold

that the findings of acquittal recorded by the Trial Court needs no interference. Hence, the appeal is dismissed.

. Bail Bond of the accused stands cancelled.

(S.S.Parkar, J.)

(S.R.Sathe, J.)